(SEAL [Filing of Motion])
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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CRAWFORD & COMPANY and
FLEETWOOD HOMES OF FLORIDA,

Petitioners,

CASE NO.
98-65-CIV-ORL-18C

vs.

KENNETH S. APFEL, Commissioner
of Social Security,

Respondent.
_____/

Final Judgment
Petitioners are proper parties.
GRANTED and SO ORDERED this
30th day of Nov., 1998.

s/_____
G. KENDALL SHARP
United States District Judge

(SEAL [Filing of Judgment])
98 DEC-1 AM
CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

MOTION FOR ENTRY OF FINAL JUDGMENT

COME NOW, Petitioners, Crawford & Company and Fleetwood Homes of

Florida, and move this Honorable Court to enter a final Judgment declaring Petitioners proper parties and requiring the Administrative Law Judge to institute a rehearing, and in support thereof state as follows:

1. On January 9, 1996, Crawford and Company and Fleetwood Homes (Petitioners) filed a Motion to Intervene in the social security claim filed by Debra D. Scott in Tampa, Florida.

2. On July 11, 1996, the presiding Administrative Law Judge, G. Marvin Bober, entered an Order denying Petitioners' Motion to Intervene.

3. Petitioners filed a Petition for Review with the United States District Court, Middle District of Florida, Orlando Division, on August 9, 1996.

4. On August 18, 1997, the presiding United States Magistrate Judge, James G. Glazebrook, entered a

Report and Recommendation, recommending the action be dismissed without prejudice for lack of jurisdiction as there was no final order. Judge Glazebrook held that a decision is not final until the movant has obtained a decision from the Appeals Council. The Appeals Council had not yet ruled on petitioners request for review of Judge Bober's decision and consequently, Judge Glazebrook found that the Commissioner had not rendered a final decision.

5. Petitioners filed an Objection to the Report and Recommendation which was treated as a Motion for Reconsideration per the August 18, 1997 Order. The presiding United States Magistrate Judge, James G. Glazebrook, entered an Order on September 15, 1997, holding that without Appeals Council review of the Administrative Law Judge's decision, no final decision of the Commissioner

exists which would be subject to District Court review. The September 15, 1997 Order permitted Petitioners to exhaust their administrative remedies by seeking the Appeals Council review.

6. On December 30, 1997, the presiding Administrative Appeals Judge, John W. Wojciechowski, entered an order dismissing the Petitioners' request for review under 20 C.F.R. 404.967 and 416.1467 on the grounds that Petitioners were not proper parties.

7. On January 23, 1998, Petitioners filed a Petition for Review with this Court.

8. On March 26, 1998, Kenneth S. Apfel, Commissioner of Social Security (Respondent), filed a Motion to Dismiss Petitioners' Petition for Review.

9. On April 21, 1998, Petitioners filed an opposition to Respondent's

Motion to Dismiss.

10. On June 15, 1998, Judge Glazebrook granted the Motion to Dismiss, reasoning that 42 U.S.C. Section 405(g) limited judicial review to "individuals", and not corporations.

11. On June 26, 1998, Petitioners filed a Memorandum of Law in Opposition to the Report and Recommendation, which was treated as a Motion for Rehearing, to the United States District Court, Middle District of Florida, Orlando Division.

12. Petitioners maintained that Judge Glazebrook's ruling was in error. Petitioners contended that Judge Glazebrook erred in his determination that Petitioner, Fleetwood Homes, was a corporation, and not an individual, and thus was not a proper party to this action.

13. Petitioners emphasized that Judge Glazebrook's ruling was

contrary to the United States Supreme Court holding which states that judicial review under Section 405(g) is not limited to "individuals" per se. Califano v. Yamasaki, 99 S.CT. 2545 (1979). See also, Attorney Registration and Disciplinary Commissioner of the Supreme Court of Illinois v. Richard S. Schweiker, 715 F.2d 282 (7th Circuit, 1983) and Avery v. Heckler, 584 F.Supp. 312 (U.S.D.C. Mass, 1984).

14. After receiving Petitioners' Motion for Rehearing, U.S. District Judge Kendall G. Sharp, on July 9, 1998, rejected U.S. Magistrate Judge Glazebrook's Report and Recommendation. Judge Sharp found that Petitioners were proper parties and therefore had subject matter jurisdiction.

15. A status conference was subsequently held on October 19, 1998. During the status conference, the

parties agreed that no substantive issues remain for determination by the Magistrate Judge. Accordingly, Judge Glazebrook ordered that Petitioners may file and serve a Motion for Entry of Final Judgment.

WHEREFORE, for the foregoing reasons, Petitioners move this Court to enter a Final Judgment declaring Petitioners to be proper parties to Debra Scott's Social Security claim. Petitioners further move this Court to require the Administrative Law Judge to institute a rehearing allowing Petitioners to intervene in Scott's social security claim.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 9th day of November, 1998 to I. Randall Gold, Assistant U.S. Attorney, 201 Federal Building, 80 North Hughey Avenue, Orlando, FL, and to Karen Aviles, Office of General Counsel, 6401

Security Blvd., Room 611, Almeir Building, Baltimore, MA 21235.

s/_____

Derrick E. Cox, Esquire
Florida Bar No.: 0858153
HURLEY, ROGNER, MILLER, COX & WARANCH, P.A.
200 South Orange Avenue
SunTrust Tower, 20th Floor
Orlando, FL 32801
(407) 422-1455
Attorney for Petitioners

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(SEAL [Filing of Report])
FILED
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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CRAWFORD & COMPANY, and
FLEETWOOD HOMES OF FLORIDA,

Plaintiff,

vs. Case No.
98-65-CIV-ORL-18C

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant.
_____/

The recommendation is rejected.
The Court finds that Plaintiffs are proper parties and therefore have subject matter jurisdiction.
9 July 98
s/_____
G. KENDALL SHARP
U.S. DISTRICT JUDGE

(SEAL [Filing of Judgment])
FILED
98 JUL-9 AM 11:46
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

REPORT AND RECOMMENDATION

This cause came on for oral argument on June 9, 1998 on the

following motion:

MOTION: MOTION TO DISMISS PETITION [Docket No. 6]

FILED: March 26, 1998

RECOMMENDATION: GRANTED for lack of subject matter jurisdiction

I. The Facts and Procedural History

Petitioners Crawford & Company and Fleetwood Homes of Florida ["petitioners"] appeal pursuant to 42 U.S.C. §405(g) from a final decision of the Commissioner of Social Security ["the Commissioner"] denying their motion to intervene as parties to an administrative hearing regarding whether Debra Scott was entitled to social security disability benefits. *See* Docket Nos. 6-7, 10, Debra Scott is the former employee of Fleetwood Homes of Florida ["Fleetwood"], a self-insured employer. Crawford & Co. is Fleetwood's servicing agent.

In 1994, Scott injured her leg during the course of her employment.

That same year, Scott applied to the social security administration for supplemental social security benefits on the grounds that she was disabled. In 1995, Scott also applied to Crawford & Co. for permanent total disability benefits under Florida's worker's compensation laws, Fla.Stat. §440.15, claiming to have suffered a "catastrophic injury" while on the job. Under Florida Law, only a catastrophic injury constitutes permanent total disability. *See* Fla.Stat. §440.15(1)(b). A "catastrophic" injury may include injury severe enough to qualify for social security disability benefits. *See* Fla.Stat. §440.02(34)(f). On December 30, 1997, the Appeals Council issued an Order dismissing petitioners' request for review of the ALJ's order denying petitioners' motion to intervene in Scott's social security hearing. *See also Crawford &*

Co. and Fleetwood Homes of Florida v. Apfel, Case No. 95-466-CV-18C (prior remand for lack of jurisdiction for failure to exhaust administrative remedies).

Crawford & Co. and Fleetwood claim that the Commissioner should have allowed them to intervene as parties to the entitlement hearing because a social security determination favorable to Scott will adversely affect them. Crawford & Co. and Fleetwood are potentially liable for payments to Scott under Florida workers' compensation laws. Petitioners are concerned that the Florida Judge of Compensation Claims (JCC) will be bound by, or otherwise defer to, the Commissioner's determination of disability.[1]

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[1] There is no indication from the record that the Florida Judge of Compensation Claims is bound to follow the determination of the Commissioner, or that the JCC will not allow petitioners the opportunity to present their evidence in

II. The Law and its Application

Petitioners assert that this Court has subject matter jurisdiction pursuant to 42 U.S.C. §405(g) to review the final decision of the Commissioner determining that petitioners' were not proper parties to the social security disability hearing of Debra Scott. Section 405(g), 42 U.S.C., provides, in relevant part, as follows:

> (g) Judicial review
>
> **Any individual**, after any final decision of the Commissioner of Social Security made after a hearing **to which he was a party**, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social

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the state workers' compensation proceedings.

Security may allow.

42 U.S.C. §405(g) (emphasis supplied). Petitioners are corporations, not individuals. Congress has taken great care to specifically name each individual who may seek an administrative determination of entitlement to disability benefits. Section 405(b)(1) provides as follows:

> Upon request by **any such individual** or **upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision** the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the

> hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision.

42 U.S.C. §405(b)(1) (emphasis supplied).

Because Congress limited benefit determinations to individuals, *see* 42 U.S.C. §405(b)(1), Congress had no need to allow anyone other than an individual to seek judicial review of the Commissioner's final decision. Thus, Congress limited judical review to "any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . ." 42 U.S.C. §405(g). Congress did not allow corporations to seek judicial review from the Commissioner's decision that they are not proper parties to a hearing because Congress envisioned only listed inviduals as requesting, or intervening in, hearings. Accordingly, this Court lacks

jurisdiction to hear petitioners' appeal under 42 U.S.C. §405(g).

Congress has given the Commissioner full power and authority to make regulations and establish procedures not inconsistent with the statute, which are necessary or appropriate to carry out the statute. *See* 42 U.S.C. 405(a). Pursuant to his authority, the Commissioner has promulgated regulations establishing who may request a hearing and who may be a party to a hearing. *See* 20 C.F.R. §§404.932(a)-(b), 416.1432(a)-(b). According to the regulations, the following may be parties to a hearing:

> After a request for a hearing is made, you, the other parties to the initial, reconsidered, or revised determination, **and any other person who shows in writing that his or her rights may be adversely affected by the hearing**, are parties to the hearing. In addition, any

> other person may be made a party to the hearing if his or her rights may be adversely affected by the decision, and the administrative law judge notifies the person to appear at the hearing or to present evidence supporting his or her interest.

20 C.F.R. §§404.932(b), 416.1432(b) (emphasis supplied).

Crawford & Co. and Fleetwood are correct that the Commissioner has worded his regulation more broadly than 42 U.S.C. §405(b)(1) by using the word "person" instead of "individual." Nevertheless, the Commissioner has interpreted the words "any other person who shows in writing that his or her rights may be adversely affected by the hearing" in these regulations as being limited to any other person who may request a hearing under 42 U.S.C. 405(b)(1). Under the Commissioner's interpretation, only a "wife, divorced wife, widow, surviving

divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes [such] a showing in writing" may be a party to a hearing under 20 C.F.R. §§404.932(b), 416.1432(b). *See* Docket Nos. 6 at 8; 7 at 3 ¶3 (Waxman Declaration); *see also* 42 U.S.C. §405(b)(1).

A district court normally defers to an agency's reasonable interpretation of its own regulations. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (courts have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer); *accord, Jamerson v. Chater*, 112 F.3d 1064, 1065-66 (oth Cir. 1997); *Nelson v. Apfel*, 131 F.3d 1228, 1234-35 (7th Cir. 1997). A

district court will not defer, however, if the agency's interpretation is manifestly contrary to the statutory standard that the regulations purport to implement. *See Sullivan v. Zebley*, 493 U.S. 521, 528, 541 (1990). The Commissioner's interpretation of 20 C.F.R. §§404.932(b) and 416.1432(b) is reasonable and thoroughly consistent with the provisions of the statute. The Commissioner's interpretation is also consistent with Congress's decision to limit judicial review under 42 U.S.C. §405(g) to "individuals" who were made a "party" to the hearing.

III. Conclusion

For the reasons stated above, the Court **RECOMMENDS** that the motion to dismiss for lack of jurisdiction be **GRANTED**, and the case be closed. Failure to file written objections to the proposed findings and

recommendations in this report pursuant to 28 U.S.C. §636(b)(1) and Local Rule 6.02 within ten days of the date of its filing shall bar an aggrieved party from a *de novo* determination by the district court of issues covered in the report, and shall bar an aggrieved party from attacking the factual findings on appeal.

DONE AND ORDERED this 15th day of June, 1998.

s/_____
James G. Glazebrook
United States Magistrate Judge

The Court Requests that the Clerk of Court Mail or Deliver Copies of this Order to All Counsel of Record and Pro Se Litigants, and to the Honorable G. Kendall Sharp.

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL

In the case of **Claim for**

Deborah D. Scott
(Claimant)

Period of Disability
Disability Insurance Benefits
Supplemental Security Income

(Wage Earner)
(Leave blank if same as above)

266-77-3454
(Social Security Number)

This case is before the Appeals Council on a request, filed by Crawford and Company/Fleetwood Homes of Florida, for review of the Administrative Law Judge's decision, dated October 11, 1996. The United States District Court, Middle District of Florida, Orlando Division (Civil Action No. 96-874-CIV-ORL-018), has directed that the Appeals Council consider this request in accordance with 20 CFR 404.967 (and 416.1467).

The Appeals Council has ascertained that Crawford and Company/Fleetwood Homes of Florida was not a party to the Administrative Law Judge's decision in this case (20 CFR 404.932 and 416.1432); is not an appointed representative of the claimant; and

that their rights with respect to benefits were not adversely affected by the Administrative Law Judge's decision and would not be adversely affected by any decision the Council might make. In this regard, the Administrative Law Judge has issued an order on July 11, 1996, denying the request from Crawford and Company/Fleetwood Homes of Florida to be made a party in the claimant's hearing proceedings.

Sections 205(a) and (b)(1) and 1631(c)(1)(A) of the Social Security Act describe when applicants and other parties are entitled to a hearing but this is only with respect to their rights to benefits under Titles II and XVI. Further, as provided in 20 CFR 422.140, any party may have rights for a hearing but only with respect to determinations on their entitlement to monthly benefits or other rights under Title II of the Act. Also, 20 CFR 422.203 states that the right for any party to request a hearing flows only from reconsideration determinations involving their rights under Title II or XVI. In this case, Crawford and Company/Fleetwood Homes of Florida has not claimed any benefits or other rights provided under Title II or XVI of the Act and has not established that such rights would be adversely affected.

Accordingly, the request for review filed by Crawford and Company/Fleetwood Homes of Florida is hereby dismissed under 20 CFR 404.967 and 416.1467 because they are not a proper party.

Notice of this action is hereby given by mailing a copy to the claimant, her representative and to the person filing the request for review on behalf of Crawford and Company/Fleetwood Homes of Florida.

APPEALS COUNCIL

original signed by
John W. Wojciechowski
Administrative Appeals Judge

Date: DEC 30 1997

Name and Address of
Person Filing Request for Review:
Derrick E. Cox, Esq.
Hurley and Rogner, P.A.
201 South Orange Avenue, #640
Orlando, FL 32801

(SEAL)
FILED
97 AUG 19 AM 9:24
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CRAWFORD & COMPANY AND
FLEETWOOD HOMES OF FLORIDA,

Plaintiffs,

-vs-

Case No.
96-874-CIV-ORL-18

JOHN J. CALLAHAN, Acting
Commissioenr of Social Security,

Defendant.

_____/

REPORT AND RECOMMENDATION

This cause came on for hearing on August 14, 1997 on Final Hearing and Oral Argument. Thereon it is RECOMMENDED that this action be dismissed for lack of subject matter jurisdiction.[1] *See* Fed.R.Civ.P.

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[1] While the parties agreed that remand would be proper, this Court cannot remand an action over which it does not properly have subject matter jurisdiction. This

12(h)(3).

On June 19, 1994, Deborah D. Scott injured her leg during the course of her employment with Fleetwood Homes of Florida, Inc. ["Fleetwood"]. *See* Docket No. 17 at 3. Scott filed a request for assistance with the Florida Division of Workers' Copmpensation on November 3, 1997. *See* Docket No. 17 at 3. Additionally, Scott filed a claim for Supplemental Security Income benefits alleging that she was totally disabled. *Id.* The Social Security Administration initially denied Scott's request. *Id.* Scott subsequently requested reconsideration and the Administration affirmed its denial on July 6, 1995. *Id.* Therefore, on July 17, 1995, Scott requested a hearing by an administrative law judge ["ALJ"]. *See*

Court need not now determine whether this Court will have jurisdiction over a post-exhaustion appeal by Crawford & Company and Fleetwood.

Docket No. 17 at 4.

Prior to the disability hearing on Scott's claim, Fleetwood Homes of Florida (Scott's employer) and Crawford & Company (Fleetwood's third-party administrator for claims under the Florida workers' compensation statute) filed a motion to appear as a party to the hearing as permitted by 20 C.F.R. §404.932(b). *See* Docket Nos. 17 at 4, 18 at 1. Fleetwood and Crawford & Company argued that a determination by the Commissioner that Scott was entitled to disability benefits would adversely affect them in the workers' compensation proceedings. *See* Docket No. 17 at 4; *see also* §440.02(34). On July 11, 1996, The Honorable G. Marvin Bober, Administrative Law Judge, denied the requests of Fleetwood and Crawford & Company to appear as parties to the hearing. *See* Docket No. 17 at 4. On August 11, 1996, Fleetwood and

Crawford & Company filed this action pursuant to 42 U.S.C. §405(g) challenging Judge Bober's denial of their request to intervene. *See* Docket No. 1. Four days later, on August 15, 1996, Fleetwood and Crawford & Company mailed a letter to the Appeals Council requesting review of Judge Bober's decision.[2] As of the date of the hearing, the Appeals Council has not issued any decision regarding plaintiffs' appeal.

The Court's jurisdiction to review decisions by the Commissioner of Social Security ["Commissioner"] is governed by 42 U.S.C. §405(g), which provides, in pertinent part:

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[2] Fleetwood and Crawford & Company filed the letter at the hearing as Ex. 1, but did not attach it to any paper prior to the hearing. Therefore, prior to the hearing, the Court was unaware that plaintiffs had actually requested review by the Appeals Council. In the letter to the Appeals Council, mailed *after* filing this action, plaintiffs sought advice "whether this is the type of decision which the Appeals Council may properly review."

> [a]ny *individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party,* irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia . . . . Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

See 42 U.S.C. §405(g) (emphasis added). This Court's jurisdiction is thus limited to final decisions of the Commissioner, unless the appellant

presents a colorable constitutional issue. *See Brown v. Sullivan*, 921 F.2d 1233, 1237 (11th Cir. 1991). Only after an individual[3] has proceeded through all steps of the administrative process, including review by the Appeals Council, may an individual seek judicial review in the district court. *See Bowen v. City of New York*, 106 S.Ct. 2022, 2026 (1986). Therefore, a decision is not "final" until the movant has obtained a decision from the Appeals Council. *See Stone v. Heckler*, 778 F.2d 645 (11th Cir. 1985); *Ryan v. Bentsen*, 12 F.3d 245 (D.C. Cir. 1993). *See also, Bowen*, 106 S.Ct. at 2027 (individual may seek review by district court pursuant to 42 U.S.C. §405(g) only after following all of the steps of

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[3]. Crawford & Company and Fleetwood Homes of Florida have not briefed the issue of whether they are "individuals" within the meaning of 42 U.S.C. §405(g). *See e.g.*, 20 C.F.R. 422.210.

the administrative procedure, including seeking review by Appeals Council); 20 C.F.$. §422.210.

Because the Appeals Council has not yet ruled upon plaintiffs' request for review of Judge Bober's decision, the Commissioner has not rendered a final decision. Therefore, this Court lacks subject matter jurisdiction and the action must be dismissed. *See* 42 U.S.C. §405(g); Fed.R.Civ.P. 12(h)(3). Accordingly, it is

RECOMMENDED that this action be DISMISSED without prejudice for lack of jurisdiction given that there is no final decision by the Commissioner. Failure to file written objections to the proposed findings and recommendations in this report pursuant to 28 U.S.C. §636(b)(1) and Local Rule 6.02 within eleven days of the date of its filing shall bar an aggrieved party from a de novo determination by the district court of

issues covered in the report, and shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully submitted this 18th day of August, 1997.

s/_____
James G. Glazebrook
United States Magistrate Judge

Copies to: The Hon. G. Kendall Sharp
Counsel of Record.

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

IN THE CASE OF	CLAIM FOR
	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
Deborah D. Scott	
(Wage Earner)	266-77-3454 (Social Security Number)

ORDER

Crawford & Company and Fleetwood Homes of Florida, hereinafter referred to as employer, filed a motion to intervene in this proceeding, as well as a memorandum of law in support thereof. Claimant, through counsel, filed a reply.

Employer relies upon 20 CFR 404.932(b) to give it standing in this Social Security disability proceeding. This Regulation provides that after a request for rehearing is made by claimant "any other person who shows in writing that his or her rights may be adversely affected by the hearing, are parties to the hearing."

The threshold question to be resolved is whether the employer "may be adversely affected" (i.e. has

standing). Use of Federal Rules of Civil Procedure 24 which concerns intervention in federal civil litigation is appropriate to resolve intervention in federal administrative litigation.

A party seeking to intervene under Rule 24(b)(2) must show that its application is timely and, as pertinent to this discussion, its claim or defense and the main action has a question or law or fact in common. Chiles v. Thornburgh, 865 Fed 1197 (11th Cir. 1989); Purcell v. BankAtlantic Financial Corporation, 1996 WL 309093 (11th Cir. (FLA)).

The employer's rationale for intervention is that under the Florida Workers' Compensation Statute (Section 440.02(34)(f)(1994), a catastrophic injury as defined therein includes any injury which would qualify an employee to receive disability income benefits under Title II or supplemental security income benefits under Title XVI of the Social Security Act (Act). Applying the Rule 24 test to the employer's rationale, employer's motion must fail.

The employer has no interest in the Social Security Case. It will have an opportunity to protect its interest in the State Workers' Compensation claim.

Moreover, as to the question of whether the employer's claim or defense and the main action has a question of law or fact in common, the short answer is negative.

Employer argues that where an injured employee files both a workers' compensation claim and a Title II, Title XVI or a concurrent application under the Act, and is found to be totally disabled under the Act, Judges of Compensation Claims (JCC) are required under Florida statute to consider a decision issued pursuant to the Act by an Administrative Law Judge (Judge). As such, employer claims its interest in the State workers' compensation case may be adversely affected by the Judges' decision in the Social Security disability case.

In my opinion this reasoning is misplaced. First, it is not mandatory for a JCC to consider a Judge's Social Security decision. It is merely discretionary. Thus, the outcome of the disability case is not legally binding or necessarily even considered in the State workers' compensation proceeding.

Entitlement to coverage under the Act is dissimilar to coverage under the State workers' compensation statute. Under the Act, in order for a claimant

to prevail, disability must be total. In contrast under the State statute disability may be permanent or temporary, permanent or partial. Thus, it is possible to be covered under the State provisions, and at the same time, not be entitled to benefits under the Act.

In essence, the employer is seeking two bites of the disability kiwi fruit. Protection of its interest in the State action is its sole remedy. Thus, I find that denying its motion for intervention does not adversely affect such interest.

Indeed argumendo, I found in favor of the employer, the next issue to be addressed is whether claimant's privilege to have her medical records kept confidential would be violated. Section 455.241(2) of the Florida Statutes provides, in pertinent part, that medical records may not be furnished to and the medical condition of a patient may not be discussed with any person other than the patient or patient's legal representative or other health care providers involved in the care and treatment of the patient, except upon written authorization of the patient. There are other exceptions to the disclosure rules, but they are inapplicable to this situation.

In my opinion, the confidentiality of claimant's medical records will be breached by employer's tender of such medical records for introduction in a Social Security disability case. Furthermore, Florida law precludes employer's attempt to introduce claimant's medical records into such a proceeding without her authorization. Generally, Acosta v. Rechter, 671 So.2d 149 (FLA. 1996). Public policy should preclude the employer from manipulating the adjudicative process. Porter v. Chater, 895 F.Supp. 1427 (D.Kan 1995).

In light of the foregoing, I conclude that employer's interest will be adequately protected in the State Workers' compensation claim, and its participation in the Social Security case is barred. Granting the motion to intervene will not permit it to prevail, as Florida law extends privilege status to a patient's medical records.

It is ORDERED that the motion to intervene is DENIED.

s/_____
G. Marvin Bober
Administrative Law Judge

July 11, 1996
Date